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In The

SUPREME COURT of the UNITED STATES

October Term, 1966

No. 1177

CASEY GRAY, ALAN COWIE and PAUL WOODMAN, Individually, jointly and on behalf of all other Non-Residents of the STATE OF WISCONSIN who are residents of the STATES OF ILLINOIS AND MICHIGAN, and who are allegedly subject to the WISCONSIN INCOME TAX,

Petitioners,

vs.

JAMES R. MORGAN, Commissioner of Taxation for the State of Wisconsin,

Respondent.

BRIEF FOR RESPONDENT IN ANSWER TO PETITION FOR WRIT OF CERTIORARI

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STATEMENT OF THE CASE

The petitioner's statement is adequate, except that it fails to note that the Court of Appeals specifically holds in Chief Judge Hastings' opinion that 28 U. S. C. sec. 1341 limits sec. 1343, saying (371 F2d 172, 175):

> We hold that sec. 1341 means what it says, and . . . that plaintiffs . . . may not use a federal forum to seek the equitable relief sought here against the state income taxes in question.

ARGUMENT AGAINST GRANTING THE PETITION

I. REVIEW OF THE JUDGMENT OF THE COURT OF APPEALS IS SUPERFLUOUS BECAUSE THAT COURT FOLLOWED THE CONSTANT AND REPEATED DECISIONS OF THIS COURT IN CONSTRUING 28 U. S. C. SEC. 1343 (THE ONLY BASIS OF FEDERAL COURT COMPETENCE THAT PETITIONERS HAVE ALLEGED) TO RELATE TO VINDICATION ONLY OF "RIGHTS OF PERSONAL LIBERTY" BUT NOT OF ECONOMIC RIGHTS THAT CAN BE EXPRESSED IN PECUNIARY TERMS.

The petitioners have stated, as "questions presented", the two chief issues raised in the District Court for the Western District of Wisconsin and in the Court of Appeals for the Seventh Circuit, issues which will be before this Court if it grants the petition for certiorari. But what is now before this Court is not these issues but the question whether there are "serious and important reasons" for reviewing the decision of the Court of Appeals. Supreme Court Rule 19, paragraph 1; Rule 23, paragraph 1 (h). Whether the decisions below were correct or incorrect, this Court may find it expedient to grant or deny the petition.

As for the meaning of 28 U. S. C. sec. 1343 (3), the petitioners do not and could not claim that this case presents any of the situations set out in Rule 19 as likely to induce the Court to issue the writ; but, attacking the merits of the jurisdictional decisions below, they seem to urge that this Court should grant their petition in order to reconsider its repeated interpretation of 28 U. S. C. sec. 1343

(3), namely, that it relates to "personal liberty" claims but not to "property" claims.

Justice Stone clearly expressed the rule in *Hague vs. C. I. O.*, 307 U. S. 496, 531 (1939):

> "... whenever the right or immunity is one of *personal liberty, not dependent for its existence upon the infringement of property rights,* there is jurisdiction in the District Court under Section 24 (14) of the Judicial Code to entertain it ..." (Italics added)

If this were a new issue, the diversity—or even confusion, in view of sec. 1343 which, as petitioners' brief shows, *lower* federal courts have recently shown in applying it, would be a persuasive reason for this Court to undertake review. But the Supreme Court itself has shown no uncertainty in its decisions, as the opinions below show. Moreover on the last occasion when this issue was presented to it—by appeal, not by certiorari—this Court pronounced only the briefest per curiam opinion in affirmance of the decision of the District Court, which had followed the view of Justice Stone, quoted above.

Abernathy vs. Carpenter, 373 U. S. 241 (1963)

It seems clear then that the Supreme Court only four years ago thought that the "personal liberty" limitation of sec. 1343 (3) needed no correction or further elucidation. We see no reason for the Supreme Court now to take any different view of the situation.

Several lower court decisions in tax cases have followed, most recently *Busse vs. Long,* 254 F. Supp. 797 (1966), and *Alterman Transit Lines vs. Public Service Com-*

mission of Tennessee, 259 F. Supp. 486 (1966). In the latter case the court said (p. 492):

> The Civil Rights Act, 28 U. S. C. sec. 1343 . . . may be thought of as a remedy in cases where the right asserted is incapable of pecuniary valuation. . . . Generally, jurisdiction under this Act can not be invoked in a pure tax action. A mere allegation of discrimination is insufficient to invoke Civil Rights Act jurisdiction automatically . . . Otherwise the jurisdictional amount provisions of 28 U. S. C. sec. 1331 and sec. 1332 could easily be circumvented by a mere allegation of denial of equal protection. . . . Equal protection in tax actions may constitute a federal question but it does not necessarily involve a corresponding Civil Rights Act violation.

If these cases speak the Court's mind, the "personal liberty" limitation of sec. 1343 needs no further affirmation.

II. REVIEW OF THE JUDGMENT OF THE COURT OF APPEALS IS SUPERFLUOUS BECAUSE THAT COURT FOLLOWED THE CONSTANT AND REPEATED DECISIONS OF ALL FEDERAL COURTS, INCLUDING THIS COURT, AFFIRMING PER CURIAM, IN CONSTRUING 28 U. S. C. SEC. 1341 TO BE AN EXCEPTION TO OR LIMITATION OF THE COMPETENCE BESTOWED ON FEREDAL COURTS BY 28 U. S. C. SEC. 1343.

The second question is whether 28 U. S. C. sec. 1341 is or is not a limitation on sec. 1343. It is only this second question that presents by any possibility what petitioners call a" case of first impression". (Pet. p. 8)

Heretofore this question has not been discussed by the Supreme Court. The Supreme Court may deem it "an important question of federal law which has not been, and should be, settled by this Court". Rule 19, paragraph 1 (b).

On the other hand, *Abernathy vs. Carpenter,* 208 F. Supp. 793, 796 (1962), did consider it. The Court there took sec. 1341 to mean what it says, and the Supreme Court affirmed that case per curiam, without citation of authority.

Abernathy vs. Carpenter, 373 U. S. 241 (1963). So even this issue is not really "a case of first impression."

Nor do the petitioners make any serious attack on this ruling. Their argument consists only of (1) the palely relevant statement that Congress could have been more explicit, i.e. could have made it plain in sec. 1343 that sec. 1341 limited sec. 1343 (instead of saying in sec. 1341 that "District Courts shall not . . . restrain . . . collection of" state taxes); and (2) the naked assertion that the lower court's view, that sec. 1341 was such a limitation, is a "doctrine concerning civil rights which is novel and pernicious". (Pet. p. 12). The *Abernathy* case makes it no longer novel; and we see nothing pernicious in treating sec. 1341 as limiting sec. 1343 as well as other grants of jurisdiction to district courts.

For, as Judge Doyle said, 251 F. Supp. 316, 318 (1966), (Pet. p. 27a) of sec. 1343:

> ". . . it does not supercede the clear prohibition of Section 1341, not override the reasons for federal judicial retraint in the area of taxation by the states."

And Chief Judge Hastings agreeing, 371 F2d 172, 175 (1966) (Pet. p. 29a) referred approvingly to another recent

District Court decision so ruling on the relation between sec. 1341 and 1343.

Bussie vs. Long, 254 F. Supp. 797, 801 (1966).

In *Bussie* the Court reviewed the federal courts' custom of abstaining from impeding state tax collection that nurtured the enactment of sec. 1341 in 1937.

We therefore conclude that there is no sufficient reason for the Court to grant petitioners' prayer for certiorari.

III. THE HISTORY OF SECTIONS 1341 AND 1343 SUPPORTS THE LOWER COURTS' APPLICATION OF THESE SECTIONS WHICH RESULTED IN DISMISSAL AND AFFIRMANCE OF DISMISSAL OF THIS ACTION.

The opinions below deal with the foregoing issues in some detail and fully sustain our view of the law. To confirm their interpretation of the present sec. 1341 and 1343, we add, for the Court's convenience, a summary review of the statutory history of these sections.

The Civil Rights Acts, enacted at the end of the Civil War, enlarged federal court jurisdiction to prevent the perpetuation of slavery and racial discrimination, that might linger in state jurisprudence and judicial administration. The present law, 28 U. S. C. sec. 1343 (3), which plaintiff invokes to support the jurisdiction of the District Court in this case is descended from the parts of the Civil Rights Acts of 1866 and 1871 that entered the Revised Statutes of 1874 as sec. 629 Sixteenth. This paragraph became para-

graph 14 of sec. 24 of the Judicial Code of 1911, which in 1940, when the United States Code was enacted, became 28 U. S. C. sec. 41 (14), and, by the revision of 1948, 28 U. S. C. sec. 1343 (3). (Herein the term Judicial Code refers to the Judicial Code of 1911, and 48 U. S. Code, which title is now called the Judicial Code, refers to the enactment of 1940, which, revised, remains in effect.)

The language has changed appreciably from the original act of April 8, 1866, 14 Stat. 27, C. 31, sec. 1 and 3, which said:

> 1. [All] citizens . . . shall have the same right . . . to full and equal benefit of all laws and proceedings for the security of persons and property as is enjoyed by white citizens.
>
> 3. . . . the district courts of the United States . . . shall have . . . cognizance of . . . all causes civil or criminal affecting persons who are denied . . . in the courts of [any state] any of the rights secured to them by the first section of this act.

28 U. S. C. sec. 1343 (3) now gives District Courts jurisdiction of civil actions

> to redress the deprivation, under color of any state law . . . custom or usage, of any right secured by the Constition of the United States or by any act of Congress providing for equal rights of citizens or of all persons. . . .

The elimination of mention of laws "for the security of . . . property" does not withdraw protection of such rights in itself. The term "any right secured by" the federal law is broad enough to include them. But property rights are

no longer, if ever, covered by sec. 1343 (3) in its present or earlier form, for reasons that are just as significant today as when *Holt vs. Indiana Mfg. Co.*, 176 U. S. 68, was decided in 1900. Then the jurisdictional statute (R. S. Section 629) gave the District Court jurisdiction of suits

> brought by any person to redress the deprivation, under color of any law . . . custom or usage of any state, of any right, privilege or immunity, secured by the law of the United States providing for equal rights of . . . all persons within the United States.

Whatever the reach of R. S. Section 629 prior to 1875 the establishment, by the Act of March 3, 1975, 18 Stat. 470, C. 231, of the general "federal rights" jurisdiction of U. S. Courts, enlarged access to those courts, provided the suit surmounted a valuation floor—the so-called "Jurisdictional amount". If the earlier Civil Rights Acts were given their fullest possible meaning, the new statute would not have amplified, perhaps would have restricted, federal district court jurisdiction. But the phrase "providing for equal rights" was now the significant phrase differentiating the old "civil rights" classification from the widely embracing category of "federal rights" (the rights now covered by 28 U. S. C. sec. 1331).

So when in 1900 the Indiana Mfg. Co. sued Holt and others who were "taxing officers" of Indiana—as plaintiffs here are suing the Tax Commissioner of Wisconsin—to prevent the collection of taxes which the plaintiff asserted violated federal law, the Supreme Court ordered the trial court to dismiss the bill because the amount involved was too small for the suit to qualify under the new legislation. Of the

older empowering statutes the court remarked that it was sufficient to say they refer to civil rights only and are inapplicable here. (176 U. S. at 72).

It is true that in that case the Court seems to equate "civil rights" with rights arising under the Fourteenth Amendment, and the Indiana Co.'s objections to the tax were put on other constitutional grounds. But the Supreme Court narrowed their meaning further in *Hague vs. C. I. O.*, 307 U. S. 496 (1939), where Justice Roberts said at p. 507:

> Until 1875, save for the limited jurisdiction conferred by the Civil Rights Acts, federal courts had not original jurisdiction of actions or suits merely because the matter in controversy arose under the Constitution or laws of the United States.

The lack of showing of a sufficient "jurisdictional amount" prevented that suit from qualifying for handling by the U. S. Courts under Judicial Code, sec. 24 (1), the general "federal rights" jurisdiction. But the plaintiffs invoked also sec. 24 (14), the civil rights heading. Justice Stone accordingly proceeded at p. 530 to distinguish these paragraphs:

> Since the two provisions [i.e.(1) and (14)] stand and must be read together, it is obvious that neither [abolishes] the other. . . . By treating Section 24 (14) as conferring federal jurisdiction of suits brought under the [Civil Rights] Act of 1871 in which the right asserted is inherently incapable of pecuniary valuation, we harmonize the two parallel provisions of the Judicial Code, construe neither as superfluous and give to each a scope in conformity with its history and manifest purpose.

The Justice examined two recent cases in which sec. 24 (14) jurisdiction had been upheld and said (p. 531):

> In both, the gist of the cause of action was not damage or injury to property, but unconstitutional infringement of a right of personal liberty not susceptible of valuation in money. . . . The conclusion seems inescapable that . . . whenever the right or immunity is one of personal liberty, not dependent for its existence upon the infringement of property rights, there is jurisdiction under Section 24 (14).

Chief Justice Huges and Justice Reed expressly agreed with Justice Stone on this jurisdictional issue; the other four justices who participated did not define the line between section 24 (1) and section 24 (14). Though Justice Stone does not explicitly say that rights of "personal liberty" are the *only* rights coming under sec. 24 (14), certainly the description of the covered right of personal liberty as one "not susceptible of valuation in money" and "not dependent for its existence upon the infringement of property rights" inexorably excludes the right alleged to be infringed in the present case, which *is* susceptible of valuation in money and *is* dependent for its existence upon the infringement of property rights.

That Judicial Code Section 24 (1), 36 Stat. 1087, 1091, now 28 U. S. C. Sections 1331 and 1332, was not meant to swallow up Judicial Code section 24 (14), now 28 U. S. C. section 1343 (3), or vice versa, is indisputable because of the terminal proviso of section 24 (1):

> That the foregoing provision as to the sum or value of the matter in controversy shall not be construed to ap-

ply to any of the cases mentioned in succeeding paragraphs of this section.

36 Stat. 1087, 1091.

This was inserted to remove all doubt upon the point. H. R. Rep. No. 783 Part 1, 61st Congress 2d session page 15.

Later when sec. 24 (1) and sec. 24 (14) matured into separate sections of the U. S. Code, this sentence, no longer necessary, was deleted.

We turn now to the history of 28 U. S. C. section 1341, which sheds light on its relation to sec. 1343. The first version of the present section 1341, 50 Stat. 738, C. 726, was enacted three years before the U. S. Code of 1940, Title 48 of which displaced the old Judicial Code.

It was a proviso appended to section 24 (1) of the Judicial Code. So in 1940, when sec. 24 of the Judicial Code became 28 U. S. C. section 41, paragraph 1 of section 41 carried this proviso.

But when the Code was rearranged, revised and renumbered in 1948, section 41 of 1940 was distributed. Thus the affirmative part of section 41 (1) became the present sections 1331 and 1332, and the tax suit prohibition became section 1341, while section 41 (12), (13) and (14), with minor changes, became the present section 1343 (1), (2) and (3).

To recapitulate, the original version of section 1341 was enacted in 1937, long after section 1343 (in its earlier form of section 24 (14) of the Judicial Code). But it did not expressly limit that paragraph and did expressly limit section 24 (1). In 1940 section 24 became 28 U. S. C., sec. 41. In

the revision of 1948, 28 U. S. C. sec. 41 was split. The progeny of its first paragraph were sec. 1331, 1332, and 1341; the progeny of its fourteenth was sec. 1343 (3).

Since restriction of state tax collection was never before demanded of a federal court by a suit based on the "civil rights" jurisdiction, no court considered the effect that the proviso of sec. 24 (1) of the Judicial Code or sec. 41 (1) of 28 U. S. C. had on sec. 24 (14) or sec. 41 (14) respectively.[1]

Whatever the situation may have been before 1948,[2]

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[1]Writing while the revision of 1948 was under consideration by Congress, Herbert Wechsler, in Federal Jurisdiction and the Revision of the Judicial Code, **13 Law and Contemporary Problems** 216, 228-230, discusses the customary and statutory abstention of federal courts with respect to state law and says: "The development described should be extended by the statute to deny original jurisdiction in all cases that present a claim of federal invalidity in state legislative or administrative action where, in the language of the present statutes, a 'plain, speedy and efficient remedy' is available in the state courts . . . These observations call for qualification in one instance: the rights of action specially conferred by Congress in the Civil Rights Laws . . . It would be moving in the wrong direction to reduce the jurisdiction in this field—not because the interest of the state is smaller in such cases, but its interest is outweighed by other factors of the highest national concern. Needless to say, to promulgate the scope of the exception is no drafting problem; its measure is the rights of action given by the Civil Rights Laws."

Yet, in disregard of Professor Wechsler's opinion, Congress detached the restrictive provisos from sec. 24 (1) and made them, as section 1341 (taxation) and section 1342 (public utility regulation), as we see it, general limitations of federal court jurisdiction, not excepting "the Civil Rights Laws" jurisdiction (sec. 1343) from their reach. (We have found no cases involving the relation of sec. 1342 to sec. 1343.) Compare **Dombrowski vs. Pfister,** 380 U. S. 479, 484, note 2 (1965).

[2]The only possible civil rights case decided by a federal court during the period 1937-1948 that we have found which mentions the proviso, is **Kerr vs. Enoch Pratt Library,** 54 F. Supp. 514, 527 (1944), where the court refers to it in a footnote. It is not clear whether the fourth count of the complaint, of which the court is speaking, alleged a violation of sec. 41 (1) or of sec. 41 (14). Whichever it was, the court says that **expenditure,** not assessment or collection, of a local tax is what plaintiff complains of, and therefore, "even though literally construed, as I think it should be, this particular statutory provision", that is, the proviso, "seems not applicable here". Thereafter, the earliest case that we have found that considers the relation of the prohibition against restricting state tax collection to the civil rights head of fed-

we submit that since then the statutory prohibition of interference by federal courts with state tax collection (when there is a plain, speedy and efficient remedy by recourse to state channels of redress, the existence of which remedy it not now questioned by petitioners) has been and is today a limitation of the exercise of every part of the federal courts' jurisdiction, including that based on 28 U. S. C. sec. 1343.

CONCLUSION

The argument from precedent and reason and the argument from history concurrently show that the decision of the Court of Appeals was correct. Since the Supreme Court has already considered both the "questions presented" and has answered them as we believe they should be answered—the one expressly and consistently for many years, the other, by its per curiam disposition of *Abernathy vs. Carpenter*, 373 U. S. 241 (1963) without dignifying it by a reasoned opinion—it is our contention that no reason exists for granting the plaintiffs' request for review. We therefore ask the Court to enter an order of denial of their petition.

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eral court jurisdiction is **Olin Mills vs. Opelika**, 207 F. Supp. 332, (1962), decided two months before **Abernathy vs. Carpenter**, 208 F. Supp. 793 (1962). Both district courts upheld the prohibition without citation of cases.